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10/506,411

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Emmanouil Domazakis

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EXAMINER

CHAWLA, JYOTI

ART UNIT

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/506,411	<b>Applicant(s)</b> DOMAZAKIS, EMMANOUIL	
	<b>Examiner</b> JYOTI CHAWLA	<b>Art Unit</b> 1781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 05 April 2010.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 7-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 7-12 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

Applicant's submission and amendments filed on April 5, 2010 has been entered. Claims 7 and 11 have been amended. Claims 7-12 remain pending and are examined in the application.

### ***Specification***

Applicant's response to the new matter in the specification submitted 4/5/2010 has been considered. In the specification submitted 4/5/2010 applicant has arranged the previously disclosed subject matter including the original claims, according to 37 CFR 1.77(b) and merely added the matter to the body of specification the subject matter that was recited in the claims of 6/15/2005 , which is part of the original disclosure, thus no new matter has been added to the body of the specification. Applicant's amendment to specification dated 4/5/2010 has been entered.

### ***Claim Objections***

Claim objections raised in the previous office action have been withdrawn based on applicant's amendments of 4/5/2010.

Claims 8-9 are objected to for not stating whether the proportion of feta cheese and olive oil in claims 8-9 are by weight or by volume. For examination purposes prior art with either weight or volume proportions would be considered relevant.

### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

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(A) Claims 7, 9-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Domazakis (WO 02/065860) in view of the combination of Gerhard et al (US 3515561, hereinafter Gerhard), Sonoma Sausage, Hans Drexel (DE 10065633 A1 German document and abstract), hereinafter Drexel and Maruschke et al (EP 0505797 B1), hereinafter Maruschke.

The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(b).

Regarding amended claims 7 and 10, Domazakis teaches of a method for preparing meat-based products, which is characterized by the incorporation of olive oil instead of animal fat (Page 1, line 3), and the addition of milk protein comprising the following steps:

Regarding steps (a) and (b) Domazakis teaches mixing thin-chopped (i.e., finely chopped), non-fat (i.e., fat-free) meat at a temperature of 0 °C with water at a temperature of -2°C, polyphosphoric salts, preservatives and spices (i.e., auxiliary salts). The mixture is mixed and when the temperature of the mixture is 2°C, olive oil is added (Page 3, lines 24-28). Thus, the addition of olive oil to meat as taught by Domazakis reference is done by mechanical mixing at a temperature range claimed.

Therefore, it would have been obvious to one of ordinary skill at the time of the invention that Domazakis' process of addition of olive oil to meat product at applicant's recited temperature range would result in conserving the organoleptic, physical-chemical and nutritional characteristics in a manner similar to the instantly claimed invention.

Applicant is reminded that where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or substantially identical processes, a prima facie case of either anticipation or obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing

that they are not." *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

Domazakis teaches of meat product with auxiliary salt, such as phosphoric salt, however, the reference is silent regarding the auxiliary salt being a citrate salt (claim 1, step a). Phosphoric salts were included to enhance the water holding capacity of minced meat. Also phosphates with more than 3 P atoms are not native to the body and may be toxic (Gerhard Column 1, lines 45-55). However, other compounds including organic acids or salts thereof, such as trisodium citrate were well known to be added to sausage meat products at the time of the invention to achieve the similar water binding capacity in the sausage meat, as disclosed by Gerhard (Column 1, lines 64- to Column 2, line 12). Gerhard also discloses that part of phosphate can be replaced by trisodium citrate without losing the water binding capacity (Gerhard, Column 2, lines 1-3). Thus, citrate and phosphoric salts both are functional equivalents as both enhance the water binding capacity of the chopped meat (Gerhard, Column 2, lines 1-12). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include one art recognized functional equivalent (i.e., citrate salt) for another or in addition to another (i.e. phosphoric salt) in the sausage meat composition as disclosed by Domazakis, depending on which auxiliary salts were more easily available and affordable at the time the invention was made.

The Courts have held that the selection of a known material, which is based upon its suitability for the intended use, is within the ambit of one of ordinary skill in the art. See *In re Leshin*, 125 USPQ 416 (CCPA 1960) (see MPEP § 2144.07).

Regarding step (c), Domazakis continues mixing with simultaneous vacuum application for 3 minutes until the resulting mixture temperature rises up to 4<sup>0</sup>C (Page 3, lines 29-31), as instantly claimed.

Regarding step (e) Domazakis teaches of conveying the resulting mixture to a filling machine, where with a simultaneous vacuum is applied while encasing the mixture followed by pasteurization at 71<sup>0</sup>C (Page 3, lines 31-36), as instantly claimed.

Domazakis is silent about pasteurizing to the core temperature, however, Domazakis is

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pasteurizing meat and olive oil composition that has been encased (sausage type food) like the applicant. Domazakis also teaches the pasteurization to the same temperature of 71<sup>0</sup>C as recited by the applicant.

Regarding step (f) Domazakis teaches moving the resulting product into a freezer unit at a maximum temperatures of -2<sup>0</sup>C to 2<sup>0</sup>C (Page3, lines 35-36), which includes applicant's recited temperature.

Thus, Domazakis teaches of the process of making the meat based product as recited in steps a) to c) and e) to f) of claim 7.

Regarding step (d) Domazakis teaches addition of milk proteins and continuing vacuum mixing until the resulting mixture temperature rises up to 4<sup>0</sup>C (Page 3, lines 26-36). Process taught by Domazakis produces pork meats with olive oil products with excellent stability (Domazakis, page 3, lines 38-43). However, Domazakis is silent as to the addition of feta type cheese and stable incorporation throughout the mixture.

However, it was known at the time of the invention that cheeses comprise milk proteins. Also meat products containing cheese were known at the time of the invention (e.g., Bratwurst Links with cheddar). Further, sausage products wherein soft and/ or fresh cheeses are added to the meat in order to make a low fat sausage product were also known at the time of the invention, for example, Sonoma sausage of prior art which discloses sausage product comprising chicken and feta cheese (See page 1 of reference). Further, Hans Drexel, hereinafter, Drexel (Abstract) also teaches addition of soft cheeses to sausage products. Thus, sausage type foods comprising soft cheeses including applicant's recited type of cheese was known at the time of the invention (Bratwurst with cheddar, Sonoma sausage and Drexel). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the method as taught by Domazakis and include any desirable type of cheese, such as feta cheese, to the meat and olive oil mixture based on the teachings of Drexel. One would have been motivated to add feta cheese at least to provide an additional protein source and also provide flavor variety in the meat product as taught by Sonoma sausage and

Drexel. One of ordinary skill would have been motivated to add feta cheese to the sausage by modifying the process of making the meat based sausage product as disclosed by Domazakis (modified by Drexel), at least for the reasons of taste preference, availability and affordability of a cheese at the time the invention was made.

Regarding the addition of cheese "pieces" or lumps was also known at the time of the invention as disclosed by prior art of record (Maruschke, Figure 1 and English abstract). Further, addition of cheese as cheese pieces or lumps or paste would have been a matter of choice for one of ordinary skill in the art at the time of the invention. One would have been motivated to use paste if homogenous mixture of meat and cheese was desired or one would choose pieces or lumps of cheese if distinctly visible portions of meat and cheese wherein the cheese pieces are detached from the surrounding meat matrix are desired in the finished sausage product. Also addition of cheese as pieces helps to retain the physical, organoleptic and nutritional characteristics of cheese pieces, in the finished sausage product. One of ordinary skill at the time of the invention would have been motivated to include cheese lumps or pieces, at least for the purpose of maintaining the distinctness of cheese pieces to provide a desirable appearance and other organoleptic properties of the finished sausage product.

Regarding claim 9, Domazakis in view of Sonoma Sausage and Drexel teaches of addition of cheese. Regarding the amount of cheese Drexel teaches that the amount of cheese can be varied from 10-75 % by weight based on the weight of meat (Abstract and translation page 1, paragraph 1), which includes applicants recited range of 2-25%. Thus, addition of cheese to sausage products in the recited range was known at the time of the invention. Therefore, it would have been a matter of routine determination for one of ordinary skill in the art at the time of the invention to further modify Domazakis, in view of Drexel and add the amount of cheese in the range of 10-75% based on the weight of meat. One would have been motivated to include a cheese in amount as taught by Drexel at least for the purpose of achieving a meat and oil emulsion have desired organoleptic properties.

It is noted that varying relative amounts of meat, cheese and oil, based on the optimal color, texture, creaminess, flavor, protein and fat content desired would not have involved an inventive step, and thus, does not provide patentable distinction to the claims. Thus, the claimed invention would have been obvious over the combination of Domazakis and Drexel, absent any clear and convincing evidence and/or arguments to the contrary. Further, applicant's attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in fact situation of the instant case. At page 234, the Court stated as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coercion or cooperative relationship between the selected ingredients, which produces a new, unexpected and useful function. *In re Benjamin D. White*, 17 C.C.P.A. (Patents) 956, 39 F.2d 974, 5 USPQ 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

Regarding amended claims 11 and 12, see the rejection of claims 7 and 10. Claim 11 differs from claim 7 by elimination of the step of addition of olive oil, however, since the method as instantly claimed is a method comprising the steps, thus the reference still teaches of the process as recited in claim 11. Thus, claim 11 is rejected for the same reasons as discussed regarding the rejection of claim 7 above.

(B) Claims 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Domazakis (WO 02/065860) in view of the combination of Gerhard, Sonoma Sausage, Drexel and Maruschke, as applied to claim 7 above, further in view of Helmer et al (US 3309204), hereinafter Helmer.



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Domazakis in view of the combination of Sonoma Sausage, Drexel and Maruschke has been applied in an obviousness type rejection under 35 USC 103(a) to claim 7 above.

Regarding claim 8, Domazakis teaches of addition of olive oil. Addition of olive oil to meat is done for maximum possible substitution of animal fat (Domazakis, page 3, lines 10-15). Domazakis also teaches that the meat and olive oil products are produced by a process (as discussed regarding claim 7) wherein the products have excellent stability. Domazakis further teaches of direct frost embodiment of olive oil and maximum possible substitution of animal fat (Page 3, lines 10-15). However the reference is silent about specific amounts in which olive oil could be incorporated in the final meat product. It is noted that addition of varying amounts of vegetable oils and fats in sausage products for the purpose of modifying the fat content and caloric value was known in the art at the time of the invention. Helmer teaches that 3-30% of vegetable oils including olive oil (Column 5, line 57-59) can be added to make improved sausage products. Helmer also teaches that sausages with vegetable oils in the range of 3-30% and preferably 10% results in production of stable sausage emulsion, which upon further processing is free from emulsion breakdown, surface grease accumulation and "fat caps" in the sausage product (See Helmer Column 2, lines 4 to 25). Thus, sausage products with olive oil in the recited range of the applicant were known to produce stable meat emulsions (as taught by Helmer). Therefore, it would have been a matter of routine obvious to one of ordinary skill in the art at the time of the invention to modify Domazakis in view of Helmer and include olive oil in the meat based products in the range as taught by Helmer. One of ordinary skill in the art at the time of the invention would have been motivated to include olive oil to the sausage product in Helmer's recommended range at least for the purpose of obtaining a stable meat and oil emulsion that is free from emulsion breakdown, surface grease accumulation and "fat caps" in the sausage product (See Helmer, Column 2, lines 5-25).

### ***Double Patenting***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

I) Provisional nonstatutory obviousness-type double patenting of claims 7-112 of current application as being unpatentable over claims 6-10 and 12 of copending Application No.10/506,417 is maintained for the reasons of record (of 2/18/09 and 10/5/09), as both applications disclose methods of making sausage product by the addition of spices and auxillary salts to mince meat or meat pulp by the addition of olive oil at about 0-2 C and subsequent addition of feta cheese after initial mixing. Mixing after adding the feta cheese pieces to the mince meat or meat pulp, conveying the emulsion to a filling machine and heat treating the formed sausage product. The claims differ between the applications by the recitation of commonly known ingredients in a sausage recipe, i.e., claims of application 10/506,411 recite a citrate salt as an auxillary salt and claims of 10/506, 417 recite plant fibers and breadcrumbs. However, both applications claim recite a method of making sausage product **comprising the steps of**, i.e., the process as claimed may have other method steps and other ingredients added to it. Thus, the reasons provided in the previous office action still remain and rejection of claims 7-12 on the ground of provisional nonstatutory obviousness-type double patenting as being unpatentable over claims 6-10 and 12 of copending Application No.10/506,417 is maintained for the reasons of record.

II) Applicant has presented no argument regarding the provisional nonstatutory obviousness-type double patenting rejection of claims 7-10 over claims 1-2 of U. S. Patent No. 7026007 B2 is that U. S. 7026007. The obviousness-type double patenting rejection made in the previous office action is still deemed proper and maintained for reasons of record.

### ***Response to Arguments***

Applicant's arguments dated 4/5/2010 with respect to claims 7-12 over Domazakis in view of combination of references have been considered but are moot in view of new

grounds of rejection. Specifically applicant's argument regarding Domazakis not teaching the newly added limitation of citrate salt, has been answered in the rejection of claim 7 and 11 above.

i) Applicant's remarks of 4/5/2010, specifically directed to Domazakis where applicant alleges that "Domazakis does not disclose any kind of added cheese, let alone feta cheese but rather only mentions addition of milk protein" (Remarks, page 5, last 2 lines). In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In the instant case Sonoma sausage, Hans Drexel and Maruschke teach the sausage product with cheese including feta type cheese, as discussed above and in the previous office action.

ii) Applicant's argument that Drexel teaches a soft cheese and feta as claimed is a semi salted cheese and thus the cheese in Drexel can not be substituted for feta cheese (Page 6, Paragraph 4, lines 6-9). Applicant's arguments are once again directed against the references individually, regarding the type of cheese of Drexel has been considered, however, the rejection is based on combination of references including Sonoma sausage, which discloses sausage with feta cheese, which is the same type of cheese as recited in the rejected claims. Thus, applicant's argument is not persuasive.

iii) Applicant also argues that Drexel does not teach addition of olive oil (Remarks, page 6, Paragraph 4, lines 10-12) and Maruschke does not teach cheese pieces emulsified. In response, Olive oil and emulsified milk protein, olive oil meat composition is taught by Domazakis applicant's arguments are again directed against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986)

iv) Regarding applicant's argument that "there is no motivation in Domazakis to incorporate pieces of feta cheese into the meat based product (Remarks, page 6, lines 3-4). In response to applicant's argument that there is no teaching, suggestion, or motivation to combine the references, the examiner recognizes that obviousness may be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992), and *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007). In this case, Domazakis teaches of addition of milk protein and cheese is a known source of milk proteins. Further Bratwurst, Sonoma sausage, Drexel all teach addition of cheese to sausage at least to enhance flavor of the sausage product. Thus, the motivation to add cheese is to provide nutritional benefit of milk protein while also providing organoleptic experience of cheese, as discussed in the rejection above.

v) Applicant's argument that "there is no motivation within Drexel to combine olive oil and feta cheese in the meat product" (Remarks, page 6, Paragraph 4, lines 10-12), it is once again recognized that obviousness may be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992), and *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007). In the instant case Domazakis teaches of a method of making sausage by the addition of olive oil and milk protein. Sonoma sausage, Bratwurst and Drexel references teach sausage products comprising different types of cheese including feta cheese (Sonoma sausage). Thus, one of ordinary skill would have

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been motivated to modify Domazakis in view of the combination of references and include a cheese product as a source of milk protein to the sausage, at least for the purpose of including the nutritional benefit and organoleptic experience provided by cheese. Utilizing a specific type of cheese, such as cheddar or fresh cheese or feta cheese would have been a matter of routine determination at least based on factors like personal desire and consumer preference. Further attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in fact situation of the instant case.

Thus, applicant's arguments are not persuasive and rejections of claims 7-12 are maintained for reasons of record.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 8:30 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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/JC/  
Examiner  
Art Unit 1781

/Keith D. Hendricks/  
Supervisory Patent Examiner, Art Unit 1781